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No. 07-_____

In the Supreme Court of the United States

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeals may refuse to apply this Court's recent decision in *Lopez* v. *Gonzales*, 127 S. Ct. 625 (U.S. 2006), in a case with virtually identical facts that was pending in the Court of Appeals at the same time—thus effectively denying a long-time legal permanent resident his statutory right to pursue cancellation of removal because of a single, state-court deferred adjudication for simple possession of a controlled substance in the amount of less than one gram.

PARTIES TO THE PROCEEDINGS

Petitioner Jose Javier Avalos-Gutierrez was the petitioner in the court below. Alberto R. Gonzales, Attorney General of the United States, was the respondent. There are no other parties.

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INTRODUCTION

This is truly a petition of last resort. After repeated attempts to obtain relief in the Fifth Circuit, Petitioner Jose Javier Avalos-Gutierrez seeks this Court's review of the Fifth Circuit's refusal to recall a mistakenly issued mandate and apply this Court's recent decision in *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). This case is indistiguishable from *Lopez*. To date, this Court has granted, vacated, and remanded 62 cases to the Fifth Circuit alone for further consideration in light of *Lopez*. The same result should obtain here.

After more than twenty productive years as a legal permanent resident, Mr. Avalos-Gutierrez was deported a few months ago because of a state court deferred adjudication for simple possession of cocaine in the amount of less than one gram. Once he was placed in deportation proceedings, federal law entitled him to pursue "cancellation of removal." Under then-binding Fifth Circuit precedent, the Immigration Judge and Board of Immigration Appeals (BIA) denied him the ability to pursue that relief because his state felony offense—which would have been a misdemeanor under federal law—was considered an "aggravated felony" under the federal immigration laws. When he appealed to the Fifth Circuit, his appeal was dismissed (with concurrent issuance of the mandate) through a clerical error. In subsequent briefing, however, the Government persuaded the court that the appeal should remain dismissed because of that court's cases resolving the "aggravated felony" issue.

Those cases have now been overturned. Indeed, this Court granted certiorari in *Lopez* on the very same day that the Fifth Circuit issued its order refusing to correct the clerical error and reopen this appeal. Since then, Mr. Avalos-Gutierrez has made repeated attempts—one with the Government's consent—to have the Fifth Circuit reopen the case and apply the decision in *Lopez*.

As discussed below, this Court's "GVR" orders in light of *Lopez* include a case on which the Government expressly relied in defeating Mr. Avalos-Gutierrez's appeal. They also include a case that was dismissed at around the same time on grounds identical to what the Government asserted here. There is no just reason for this case to be treated any differently.

OPINIONS BELOW

The order of the Immigration Judge in the Executive Office for Immigration Review, U.S. Department of Justice, is reprinted at Pet. App. 44a and is not reported. The per curiam decision of the U.S. Court of Appeals for the Fifth Circuit dismissing the related lawsuit is reprinted at Pet. App. 30a and is not reported. The per curiam decision of the Fifth Circuit denying the petitioner's motion to reopen the instant case is reprinted at Pet. App. 29a and is not reported. The per curiam decision of the Fifth Circuit denying the unopposed motion for reconsideration is reprinted at Pet. App. 28a and is not reported. The order of the Fifth Circuit denying Petitioner's petition to recall the mandate is reprinted at Pet. App. 5a and is not reported.

JURISDICTION

The Fifth Circuit entered its denial of the petition to recall the mandate on December 28, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court has the power to review the denial of a petition to recall the mandate and has done so in the past. See, *e.g.*, *Lords Landing Village Condo. Council of Unit Owners* v. *Cont'l Ins. Co.*, 520 U.S. 893, 897 (1997) (granting, vacating, and remanding denial of petition to recall the mandate for further consideration in light of new authority).

STATUTORY PROVISION INVOLVED

Under 8 U.S.C. § 1229b(a)(3), the "Attorney General may cancel removal from the United States if the alien * * * has not been convicted of any aggravated felony." The Immigration and Naturalization Act (INA), in rele-

vant part, defines "aggravated felony" as, *inter alia*, "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act."

STATEMENT

Petitioner Jose Javier Avalos-Gutierrez first came to the United States as a legal immigrant in 1982, when he was 23 years old. By the time he was erroneously deported, he had lived here as a productive legal resident for 24 years, working and raising children near his extended family in Brownville, Texas.

1. In 1996, Mr. Avalos-Gutierrez was charged in Texas state court with possessing cocaine in the amount of less than one gram. Because this was his first and only offense, and because it did not constitute a serious felony,[1] the State offered him probation and treatment under Texas's deferred adjudication statute. Mr. Avalos-Gutierrez accepted this offer and entered a guilty plea. He diligently completed his drug education program and satisfied all of his obligations under the plea agreement. As a result, under the deferred adjudication law, no finding of guilt or conviction was entered against Mr. Avalos-Gutierrez. See Tex. Code Crim. P. Art. 42.12(5)(c).

Nevertheless, the Government began deportation proceedings based on this offense. In June 2002, the BIA held that the state court "conviction" made Mr. Avalos-Gutierrez removable under the INA. Pet. App. 49a.

When Mr. Avalos-Gutierrez attempted to seek "cancellation of removal," the Immigration Judge held that he was ineligible because the simple possession felony under

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[1] Texas's deferred adjudication statute cannot be applied to serious felonies such as murder, aggravated sexual assault, child molestation, or aggravated robbery. Tex. Code Crim. P. Art 42.12(3)(g)(A)(1).

state law amounted to an "aggravated felony" under the INA—the very theory that this Court later rejected in *Lopez*. Pet. App. 47a. After the BIA affirmed the decision without opinion, Mr. Avalos-Gutierrez filed a petition for habeas corpus in federal district court to review that decision.

At the same time, Mr. Avalos-Gutierrez returned to the BIA, arguing that he was eligible to apply for relief under new regulations. The BIA disagreed. Mr. Avalos-Gutierrez filed a petition for review with the Fifth Circuit to review that decision, and it was assigned Case No. 05-60496 (the "BIA Appeal").

2. The Government moved to dismiss the BIA Appeal based on defects on the face of the petition for review. In short, the Government argued that the court lacked jurisdiction because the petition for review from the BIA's decision did not identify "or even allude[] to" any constitutional or legal issues on its face.

Later, the habeas petition was transferred from the district court to the Fifth Circuit on the Government's motion under Section 106(c) of the REAL ID Act. That appeal was assigned Case No. 05-60779 (the "Habeas Proceeding"). The two appeals were never formally consolidated. The Government did not file another motion to dismiss or brief directed toward defects in the Habeas Proceeding, and the arguments in the pending motion to dismiss did not at all pertain to the habeas petition, which (unlike the petition for review) did in fact assert extensive constitutional and statutory arguments on its face.

On January 24, 2006, the Court granted the motion to dismiss the BIA Appeal. Pet. App. 30a ("respondent's motion to dismiss *petition for review* for lack of jurisdiction is granted") (emphasis added). But although both the court's order and the motion to dismiss were directed *only* to the BIA Appeal and bore only that case number, the Clerk dismissed the Habeas Proceeding as well.

Concerned over the apparent clerical error, counsel for Mr. Avalos-Gutierrez—at the Clerk's suggestion—promptly filed a motion to reopen the Habeas Proceeding. The Government opposed the motion to reopen, arguing *for the first time* that the claims asserted in the habeas petition—and in particular the claim that the state possession offense was not an "aggravated felony"—were foreclosed by previous Fifth Circuit decisions. Thus, the Government argued, while the habeas petition did assert constitutional and statutory claims on its face, the Court lacked jurisdiction because those claims were not "substantial" or "colorable." The Government conceded that the Solicitor General had recently acquiesced in the pending cert petition in *Lopez* v. *Gonzales*, which presented the identical issue. But the Government went on to argue that because its position in *Lopez* was "correct," there was "no reason to hold this case in abeyance pending the outcome of the certiorari petition in *Lopez*."

In reply, Mr. Avalos-Gutierrez argued that the REAL ID Act did not give the Court the ability to decline jurisdiction simply because it believed the petitioner's arguments would not succeed. He also argued that his "aggravated felony" claim was at least colorable, given that other federal courts of appeals had adopted his position and that petitions for writs of certiorari on that precise issue were then pending (with the Government's acquiescence) before the U.S. Supreme Court.

On April 3, 2006, the Fifth Circuit issued a one-sentence order denying the motion to reopen and thereby setting the clerical error in stone. Pet. App. 29a. In so ruling, the court apparently accepted the Government's argument that there was no jurisdiction because the claims—including the "aggravated felony" claim—were precluded by then-current Fifth Circuit case law. *On the very same day* as the Fifth Circuit's denial, however, this Court granted certiorari in *Lopez* v. *Gonzales* to resolve the "aggravated felony" issue. See 126 S. Ct. 1651 (U.S. 2006).

In light of the grant of certiorari in *Lopez*, counsel for Mr. Avalos-Gutierrez obtained the Government's consent and filed an unopposed motion for reconsideration before the Fifth Circuit. He sought an order reopening the case and holding it open until *Lopez* was decided. Counsel for Mr. Avalos-Gutierrez later received the motion back in the mail from the Clerk with the notation that the case was closed and the motion would not be docketed. By that time, however, the time to file a petition for certiorari from the original dismissal of the BIA Appeal—mistakenly extended to the Habeas Proceeding as well—had run.

Later, Mr. Avalos-Gutierrez and his family—including at least one of his U.S. citizen children—were taken without warning from their home and deported to Mexico.[2] Soon after, he reentered illegally to retrieve some belongings. He was apprehended and later pleaded guilty to a charge of misdemeanor illegal reentry. He has since been returned to Mexico. Importantly, as discussed further below, this misdemeanor conviction for illegal reentry is not itself a barrier to his application for cancellation of removal.

While *Lopez* was still pending before this Court, Mr. Avalos-Gutierrez filed a renewed motion for reconsideration in the Fifth Circuit based on a change in the Government's position on whether the REAL ID Act gave that court jurisdiction over a habeas petition in a nearly identical case. In response to a petition for certiorari in *Galindo-Pena* v. *Gonzales*, No. 05-1276, the Solicitor General acknowledged that the REAL ID Act "definitively resolved" that the Fifth Circuit had jurisdiction to review whether a state possession offense is an "aggravated felony" for purposes of federal immigration law. Under that

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[2] In July 2006, another lawyer acting on Mr. Avalos-Gutierrez's behalf attempted to seek this Court's review of the dismissal in this case based on the *Lopez* issue, arguing that the motion to reopen was functionally a petition for rehearing and tolled the time for seeking certiorari. This Court did not accept that argument and declined to docket the matter.

view, there was no basis for the Fifth Circuit to decline jurisdiction over the Habeas Proceeding in this case either. Nevertheless, this motion was denied without explanation. Pet App. 27a.

After *Lopez* was decided in December 2006, Mr. Avalos-Gutierrez filed a motion to recall the mandate based on that decision. The Government opposed this motion, and on December 28, 2006, a single judge denied it without opinion and before receiving Mr. Avalos-Gutierrez's reply. Pet. App. 5a. A panel of that Court later denied a motion for reconsideration, again without explanation. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

This Court's intervention is warranted here to ensure the Fifth Circuit's fidelity to the *Lopez* decision and—in the Court's exercise of its supervisory power—to avoid a grave injustice. The Fifth Circuit has never considered the effect of *Lopez* on this case. Indeed, as discussed below, the Government has conceded that *Lopez* would control the merits of Mr. Avalos-Gutierrez's claim and would have compelled a different result, if the mandate had not already issued.

Rather than defending the original decision in this case, the Government argued that Mr. Avalos-Gutierrez's reentry after his erroneous deportation made a recall of the mandate unnecessary. For the reasons discussed further below, that is both wrong and unfair. Those subsequent events do not change the fact that the decision in his case was—and is—wrong under *Lopez* and that he should not have been deported in the first place. Under *Lopez*, Mr. Avalos-Gutierrez is entitled to pursue cancellation of removal. Whether the illegal reentry will outweigh all the compelling evidence in favor of cancellation is a question to be resolved by the Immigration Judge, not the Fifth Circuit.

This Court has the power to grant, vacate, and remand a court of appeals' refusal to recall its mandate, and it has

done so previously under analogous circumstances.[3] Since *Lopez*, this Court has already GVR'd 65 other cases presenting the "aggravated felony" issue—62 of those to the Fifth Circuit alone. Pet. App. 1a. Among those cases is one of the very cases on which the Government relied in persuading the Fifth Circuit to decline jurisdiction in this appeal. This case should be treated no differently.

I. The Fifth Circuit Failed To Consider And Apply Controlling Supreme Court Precedent In The Instant Case.

This Court will issue a "GVR" order when "intervening developments, or recent developments that * * * the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

That is precisely the situation here. The Fifth Circuit has never fully considered the application of *Lopez* in this case, and there can be no doubt that *Lopez* is determinative.

In *Lopez*, this Court decided "whether conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is a "felony punishable under the

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[3] In *Lords Landing Village Condominium Council of Unit Owners* v. *Continental Insurance Co.*, 520 U.S. 893 (1997), this Court GVR'd the Fourth Circuit's denial of a petition to recall the mandate. The Fourth Circuit had determined that, as a matter of Maryland law, an accident as defined in an insurance policy did not include the consequences of a negligent act. *Id.* at 895. The Maryland Supreme Court, however, held the opposite shortly before the Fourth Circuit's decision. *Ibid.* When they learned of that new decision, plaintiffs filed a motion to recall the mandate, which the Fourth Circuit denied without opinion. *Ibid.* This Court sent the case back for the Fourth Circuit to apply the new authority. *Id.* at 897.

Controlled Substances Act." 127 S. Ct. 625, 627 (U.S. 2006). Like Mr. Avalos-Gutierrez, Jose Antonio Lopez was a legal resident of the United States when he was arrested on a state drug charge. *Id.* at 627. Lopez pled guilty to aiding and abetting another person's possession of cocaine, and the Government moved to deport him. *Id.* at 627. Legal residents can be removed from the country for conviction of a controlled substance offense, but they may be entitled to apply for "cancellation of removal" if the offense does not constitute an "aggravated felony." 8 U.S.C. §§ 1227(a)(2)(b)(i), 1229b(a)(3). The term "aggravated felony" includes "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of title 18)." § 1101(a)(43)(B). Section 924(c), in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act."

The Court, in a 8-1 decision, held that a state possession charge did not constitute an "aggravated felony" for purposes of the immigration laws. 127 S. Ct. at 627. Simple possession does not rise to the level of "illicit trafficking," which denotes the buying and selling of drugs. *Id.* at 629-30. Furthermore, simple possession is generally a misdemeanor under the Controlled Substances Act (CSA), and the phrase "any felony punishable under the Controlled Substances Act" requires that the CSA define the crime as a felony. *Id.* at 628. In so holding, the Court specifically rejected the rule previously followed by the Fifth Circuit. *Id.* at 629 n.3 (citing, *e.g.*, *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997)).

Like the petitioner in *Lopez*, Mr. Avalos-Gutierrez was charged with simple possession, a felony under state law but a misdemeanor under the CSA. The Government sought to deny him the ability to pursue cancellation of removal under the same legal theory as in *Lopez*—namely, that simple possession constituted an "aggravated felony" under the INA. Pet. App. 47a. And based on then-binding case in the Fifth Circuit, the Immigration Judge and BIA agreed. *Ibid.* Under *Lopez*, however, those Fifth Circuit

cases are wrong, and thus the result in Mr. Avalos-Guterriez's case is wrong as well.

The Government has conceded that under *Lopez*, Mr. Avalos-Gutierrez would have the statutory right to seek cancellation of removal—the very right he was denied by the Immigration Judge and the BIA. In response to the motion to recall the mandate, the Government explained that after *Lopez*, Mr. Avalos-Gutierrez's crime "can no longer be considered an 'aggravated felony' for purposes of precluding relief from removal in the form of cancellation of removal pursuant to 8 U.S.C. § 1229b(a); thus, if the Court had not already dismissed his petition for review and issued its mandate, he would have been at least statutorily eligible for this discretionary form of relief from removal." Pet. App. 12a.

Particularly in light of this concession, the fact that *Lopez* was briefed in the Fifth Circuit in the context of the motion to recall the mandate cannot serve as evidence that the Court fully considered, but ultimately rejected, the impact of *Lopez*. In *Lords Landing*, for example, this Court vacated the denial of a motion to recall the mandate when the Fourth Circuit, after briefing, indicated only that the motion was "without merit." 520 U.S. at 895. Chief Justice Rehnquist argued in dissent that the Fourth Circuit opinion indicated that it had considered the supervening authority at issue. *Id.* at 897-98 (Rehnquist, C.J., dissenting). The majority, however, held that "the Court of Appeals' ambiguous statement that petitioners' request was 'without merit' does not establish that it actually considered and rejected" the movant's argument based on the intervening authority. *Id.* at 896. This case is even clearer, as it is undisputed that *Lopez*—if applied here—would require a different result than the one reached in this case by the Fifth Circuit.

Indeed, one of the cases on which the Government relied in its effort to defeat the instant appeal has itself been vacated by this Court and sent back for application of *Lopez*. In opposing the motion to correct the clerical error

and reopen this appeal, the Government relied heavily on *Salazar-Regino* v. *Trominski*, 415 F.3d 436, 448 (5th Cir. 2005), in which the Fifth Circuit reaffirmed its holding on the "aggravated felony" issue. *Salazar-Regino* has now been vacated, see *Salazar-Regino* v. *Moore*, 127 S. Ct. 827 (U.S. 2006), and the Fifth Circuit recently sent the case back to the Board of Immigration Appeals for further proceedings, *Salazar-Regino v. Moore*, __ F.3d __, 2007 WL 457992 (5th Cir. Feb. 13, 2007). Surely if *Lopez* applies in that case, it should apply here as well.

This Court has also vacated the decision in at least one case that was dismissed on the same jurisdictional ground that the Government asserted here (in opposing the motion to reopen). The Fifth Circuit dismissed *Galindo-Pena v. Gonzales* for lack of jurisdiction less than two weeks before it dismissed Mr. Avalos-Gutierrez's two appeals. The Government there had offered the same argument that it later made in this case: that the court should deny jurisdiction because the "aggravated felony" issue had already been resolved conclusively in the Fifth Circuit. In response to a petition for certiorari in that case, however, the Solicitor General agreed that after the REAL ID Act "definitively resolved" that the courts of appeals have jurisdiction over such cases. On the merits of the "aggravated felony" question, the case was held for *Lopez* and was recently granted, vacated, and remanded to the Fifth Circuit. *Galindo-Pena*, 127 S. Ct. 828 (U.S. 2006).

These two cases are not alone. In all, 65 cases have been GVR'd in light of this Court's decision in *Lopez*. Mr. Avalos-Gutierrez should be afforded the same relief.

II. Mr. Avalos-Gutierrez's Reentry After He Was Erroneously Deported Did Not Give The Fifth Circuit A Legitimate Basis For Refusing To Apply *Lopez*.

The Government opposed Mr. Avalos-Gutierrez's petition to recall the mandate on the ground that he had reentered the country illegally after he had been unjustly

deported. According to the Government, that illegal reentry made it impossible for him to establish the "injustice" required before the Fifth Circuit will recall the mandate. Pet. App. 9a; Fifth Cir. Rule 41.2 (mandate should be recalled only "to prevent injustice").

At the same time, however, the Government conceded that both of the factors ordinarily required to show such "injustice" were present here. Under the Fifth Circuit's own cases, a petitioner has shown sufficient "injustice" to warrant recall of the mandate if a subsequent Supreme Court decision renders a Fifth Circuit decision "demonstrably wrong" or creates a "danger of incongruent results in cases pending at the same time." *U.S.* v. *Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) (quoting *American Iron & Steel Inst.* v. *E.P.A.*, 560 F.2d 589, 594 (3d Cir. 1977)). Here, the Government agreed that Mr. Avalos-Gutierrez's case would have come out differently under *Lopez*, and it also conceded that allowing the mandate to stand would create inconsistent results in cases pending at the same time. Pet. App. 10a-11a. According to the Government, however, the illegal reentry was still somehow a bar to future relief.[4] *Ibid.*

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[4] The Government also argued that Mr. Avalos-Gutierrez "waived the issue decided in *Lopez*" when no petition for certiorari was filed on his behalf within the first 90 days after the original, mistaken dismissal. Pet App. 9a. But under the Fifth Circuit's own precedents, that argument was meritless and cannot have formed the basis for the Court's refusal to recall the mandate. In *Tolliver*, the Fifth Circuit held that recall of the mandate was necessary in order to avoid inconsistent results in contemporaneous cases when one defendant had sought certiorari and a stay of the mandate and another had not. *Tolliver*, 116 F.3d at 123-24; accord *Gradsky* v. *United States*, 376 F.2d 993, 995 (5th Cir. 1967). Thus in the Fifth Circuit, the absence of a petition for certiorari is a *basis for*—not a barrier to—recall of the mandate. In any case, given the extensive motion practice in this case, there can be no serious argument that the *Lopez* issue was voluntarily "waived." To the contrary, when the original 90 days for seeking certiorari expired, the parties were

The Government's emphasis on the illegal reentry was both premature and highly unfair. Mr. Avalos-Gutierrez should never have been deported in the first place. He was deported at a time when this Court had under its consideration the very issue that would have enabled him to pursue cancellation of removal—relief that he would almost certainly have received, had the correct statutory interpretation been applied in his case from the beginning.

Moreover, Mr. Avalos-Gutierrez's misdemeanor conviction for illegal reentry is not a barrier to his application for cancellation of removal. Under 8 U.S.C. § 1229b(a), a legal permanent resident who has lived in the United States for as long as Mr. Avalos-Gutierrez is eligible for cancellation of removal unless he has been convicted "of an aggravated felony." Obviously, a misdemeanor illegal reentry conviction is not an "aggravated felony," just as his state deferred adjudication was not.

The issue before the Fifth Circuit—and now before this Court—is merely whether Mr. Avalos-Gutierrez should be allowed to *pursue* cancellation of removal, not whether he will ultimately receive it. And there is no longer any dispute that he had the right to pursue cancellation under the statute. Although this relief is ultimately discretionary, the decision will be made by an Immigration Judge based on evidence about the immigrant's life—evidence that Mr. Avalos-Gutierrez has never had the opportunity to present. Denying him his statutory right to present such evidence is itself a grave injustice.

In support of his application for cancellation, Mr. Avalos-Gutierrez would show that he lived in the United States productively for more than 20 years, near his parents, grandparents, and extended family in Brownsville, Texas. He would show that he practiced a trade, paid taxes, and worked to support his family. He would show

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awaiting a ruling on an *Unopposed* Motion for Reconsideration that expressly sought to reopen the appeal and hold it open pending this Court's decision in *Lopez*.

that he is of good moral character and, along with his wife, is raising children who are bright and accomplished. He would show that his deportation resulted in extreme hardship to his U.S. citizen children—since remaining with their parents would mean separation from their home, school, necessary medical care, and extended family. While he was once arrested for possessing a tiny amount of cocaine (more than ten years ago), he would show that he successfully completed a drug education program and satisfied all conditions of his probation, so that he is entitled to have the deferred adjudication charge removed from his record in Texas. And while there would also be evidence that he reentered after his deportation, he would have the opportunity to explain those events—including the fact that he would never have been deported in the first place if he had been allowed to pursue the relief for which he was and is eligible under the INA.

Whether the illegal reentry will trump all the other very compelling evidence in support of cancellation should be left to the Immigration Judge and the BIA. The question for this Court is whether Mr. Avalos-Gutierrez is entitled to pursue this relief in the first place. Under *Lopez*, the answer is yes.

CONCLUSION

Petitioner respectfully asks that the petition for a writ of certiorari be granted, the Fifth Circuit's order vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *Lopez*. Indeed, in light of the Government's concession that *Lopez* would compel a different result in this case, Petitioner respectfully submits that a summary reversal would be warranted. Alternatively, Petitioner asks that the Court grant the petition and set the case for plenary review.

Respectfully submitted,

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March 2007

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APPENDIX A

CASES GVR'D IN LIGHT OF *LOPEZ* v. *GONZALES*

Case No.	Name	Reported
	Fifth Circuit	
05-830	*Salazar-Regino* v. *Moore*	127 S. Ct. 827 (2006)
05-1276	*Galindo-Pena* v. *Gonzales* *Acosta-Grimaldo* v. *Gonzales*	127 S. Ct. 828 (2006)
05-7496	*Mendoza-Torres* v. *U.S.* *Sauzo-Izaguirre* v. *U.S.* *Ramirez-Maldonado* v. *U.S.* *Alejo-Agramon* v. *U.S.* *Eguia-Hernandez* v. *U.S.* *Armendariz-Chavez* v. *U.S.* *Palencia-Contreras* v. *U.S.* *Colatos-Rivas* v. *U.S.* *Vences* v. *U.S.* *Guardado-Ortega* v. *U.S.* *Loredo-Pecina* v. *U.S.*	127 S. Ct. 826 (2006)
05-7689	*Villanueva Prones* v. *U.S.*	127 S. Ct. 826 (2006)
05-8331	*Trejo-Hernandez* v. *U.S.*	127 S. Ct. 827 (2006)
05-8644	*Sifuentes-Flores* v. *U.S.*	127 S. Ct. 827 (2006)
05-8662	*Riascos-Cuenu* v. *U.S.*	127 S. Ct. 827 (2006)
05-9657	*Figueroa-Castro* v. *U.S.*	127 S. Ct. 828 (2006)
05-10510	*Gutierrez-Tovar* v. *U.S.* *Solis-Alvarez* v. *U.S.*	127 S. Ct. 828 (2006)

Case No.	Name	Reported
	Sequeda Mortera v. *U.S.* *Villa-Gutierrez* v. *U.S.* *Reyes-Bautista* v. *U.S.* *Aldana-Sanabria* v. *U.S.* *Torres-Martinez* v. *U.S.* *Gonzalez-Silva* v. *U.S.* *Herrera-Trejo* v. *U.S.* *Oviedo-Medina* v. *U.S.* *Piceno-Baez* v. *U.S.*	
05-11561	*Peceno-Montanez* v. *U.S.* *Mendez-Leyva* v. *U.S.* *Rosenbaum-Alanis* v. *U.S.* *Rodriguez-Cuevas* v. *U.S.* *Lumbreras-Linares* v. *U.S.* *Delgado-Castillo* v. *U.S.*	127 S. Ct. 829 (2006)
06-5185	*Rivas-Medina* v. *U.S.*	127 S. Ct. 829 (2006)
06-5187	*Martinez-Hernandez* v. *U.S.*	127 S. Ct. 830 (2006)
06-5266	*Iroko* v. *Gonzales*	127 S. Ct. 830 (2006)
06-5862	*Andrade-Mesa* v. *U.S.*	127 S. Ct. 831 (2006)
06-6078	*Flores-Huerta* v. *U.S.*	127 S. Ct. 831 (2006)
06-6565	*Regalado-Flores* v. *U.S.*	127 S. Ct. 1147 (2007)

Case No.	Name	Reported
06-6629	*Ayala-Flores* v. *U.S.* *Argueta-Hernandez* v. *U.S.* *Analco-Analco* v. *U.S.* *Calle-Villareal* v. *U.S.* *Contreras-Jimenez* v. *U.S.* *Jimenez-Esteban* v. *U.S.* *Carrillo-Monjez* v. *U.S.*	127 S. Ct. 934 (2007)
06-7871	*Ochoa-Perez* v. *U.S.* *Padilla-Gomez* v. *U.S.* *Zagal-Meraz* v. *U.S.* *Penaloza-Hernandez* v. *U.S.* *Prado-Ortiz* v. *U.S.* *Lopez-Rodriguez* v. *U.S.* *Rivera-Alvarez* v. *U.S.* *Reyes-Olvera* v. *U.S.* *Torres* v. *U.S.* *Perez-Montero* v. *U.S.* *Mondragon-Jiminez* v. *U.S.* *Rocha-Gaytan* v. *U.S.* *Ramirez-Alvarez* v. *U.S.*	167 L. Ed. 2d 66 (2007)
	Eighth Circuit	
06-6766	*Tostado-Tostado* v. *Carlson*	127 S. Ct. 936 (2007)
	Ninth Circuit	
06-6023	*Rivera-Grijalva* v. *U.S.*	127 S. Ct. 831 (2006)
	Eleventh Circuit	
06-5167	*Aurelien* v. *U.S.*	127 S. Ct. 829 (2006)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
FEB 13 2007
CHARLES R. FULBRUGE III
CLERK

No. 05-60496

JOSE JAVIER AVALOS-GUTIERREZ
PETITIONER

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL
RESPONDENT

Petitions for Review of an Order of the
Board of Immigration Appeals

Before SMITH, GARZA, and PRADO, Circuit Judges:

PER CURIAM:

A member of this panel previously denied petitioner's motion to recall the mandate. This panel has considered petitioner's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

MOT-28 _____/S/_____/S/_____/S/_____

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60496

U.S. COURT OF APPEALS
FILED
DEC 28, 2006
CHARLES R. FULBRUGE III
CLERK

JOSE JAVIER AVALOS-GUTIERREZ
PETITIONER

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL
RESPONDENT

Petition for Review of an Order of the
Board of Immigration Appeals

ORDER:

IT IS ORDERED that petitioner's motion to recall the mandate is DENIED.

/S/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

MOT - 21A

APPENDIX D

No. 05-60496

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE JAVIER AVALOS-GUTIERREZ,
(A38 095 843)
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO RECALL MANDATE

Respondent, by and through counsel, hereby opposes Petitioner's Motion to Recall the Mandate[1] because Petitioner has not demonstrated that recalling the mandate would "prevent injustice." One important fact missing from Petitioner's Motion to Recall the Mandate - premised on the Supreme Court's decision in Lopez v. Gonzalez, 127 S.Ct.

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[1] Petitioner lists the docket number for this case as 05-60779; however, as argued in "Respondent's Response to Petitioner's Motion to Reopen" filed in that case (see Tab F of Petitioner's Appendix in Support of Motion to Recall Mandate), Respondent understands this Court's docketing procedures to be that when an additional appeal from the same individual is filed, the original "lead case" docket number is used for all future filings and orders. The docket number for the case in this Court that was transferred from the district court is 05-60779 and the docket number for the original petition for review of the Board of Immigration Appeals decision is 05-60496.

625 (2006) - is that Petitioner failed to file a timely petition for a writ of certiorari with the Supreme Court. On July 7, 2006, the Supreme Court rejected the petition as untimely.

BACKGROUND

On January 24, 2006, this Court granted Respondent's motion to dismiss the petition for review filed by Petitioner in case number 05-60496. The petition for review was an appeal of a decision of the Board of Immigration Appeals ("Board") dated May 17, 2005, in which the Board found that the Petitioner's motion to reopen his removal proceedings was untimely and that he was ineligible for relief under former section 212(c) of the Immigration and Nationality Act ("INA"). The basis for Respondent's motion to dismiss was that Petitioner is an alien who is removable as an alien convicted of a controlled substance offense "covered" in INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), based on his conviction in Texas state court for possession of cocaine.[2] Therefore, INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), deprived the Court of jurisdiction over the petition for review.

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[2] Respondent properly noted in his motion to dismiss case number 05-60496 that Petitioner was found removable not as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii), but rather as an alien convicted of a controlled substance violation under 8 U.S.C. § 1227(a)(2)(B)(i). In responding to Petitioner's motion to reopen case number 05-60779, Respondent inadvertently referred to Petitioner's drug conviction as having given rise to a finding a removability for an aggravated felony. As is clear from the Immigration Judge's decision in this case (see Petitioner's Appendix B in Support of His Motion to Recall the Mandate), Petitioner was found removable not as an aggravated felon, but as a controlled substance violator. However, Petitioner's offense was deemed to be an "aggravated felony" for purposes of relief from removal (see Appendix B at 5-6), and therefore he was deemed ineligible for cancellation of removal under 8 U.S.C. § 1229b(a).

On August 10, 2005, while this motion to dismiss was pending, Petitioner's habeas corpus petition was transferred to this Court pursuant to the REAL ID Act of 2005 ("REAL ID"), Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302 (2005), enacted on May 11, 2005. That habeas corpus petition was given the additional docket number of 05-60779. On that same day, according to PACER, this Court entered the following order in docket number 05-60779:

> Motion filed by Respondent Alberto R Gonzales in 05-60779 to dismiss petition for lack of jurisdiction. [5310429-1], in the alternative, to extend time to file administrative record on appeal until 30 days from the Court's denial of Respondent's motion to dismiss petition [5310429-2] Date of COS: 10/4/05 Sufficient [Y/N]: Y [05-60779] (Filed in Lead case on 6/30/05) (cvt) [05-60779].

Therefore, the parties were aware that the motion to dismiss filed in case number 05-60496 was also filed in the additional appeal, case number 05-60779. Thus, the Court's order of January 24, 2006, albeit captioned with only docket number 05-60496, pertained to both cases in this Court. As such, on January 24, 2006, this Court dismissed the petition for review in case number 05-60496 and the transferred habeas petition in case number 05-60779. In short, both cases were dismissed because Petitioner's criminal conviction rendered him removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a controlled substance offense. Accordingly, since this Court determined that Petitioner was an alien who is removable because he has committed an offense "covered" in INA § 237(a)(2)(B)(i), the Court dismissed the cases for lack of jurisdiction under INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) .

ARGUMENT

THE COURT SHOULD DENY THE MOTION TO RECALL THE MANDATE BECAUSE PETITIONER HAS NOT SHOWN THAT "EXTRAORDINARY CIRCUMSTANCES" EXIST TO WARRANT SUCH A RECALL

The Supreme Court has stressed that "[i]n light of 'the profound interests in repose' attaching to the mandate of a court of appeals . . . the power [to recall the mandate] can be exercised only in extraordinary circumstances." Calderon v. Thompson, 523 U.S. 538, 550 (1998) (citing 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed. 1996)). As the Supreme Court explained, "[t]he sparing use of the power [to recall a mandate] demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." Id. at 550.

In a criminal case, this Court has stated that "[u]nder Rule 41.2 of the Fifth Circuit Rules, we may recall our mandate if necessary in order to prevent injustice. An example of such an injustice is when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong." U.S. v. Tolliver, 116 F.3d 120, 123 (5th Cir. 1997). However, as demonstrated below, despite a recent decision by the Supreme Court in Lopez, supra, no injustice is present in this case.

First, despite Petitioner's argument that after its decision in Lopez, the Supreme Court granted certiorari in fifteen related cases from this Circuit (see Petitioner's Motion to Recall Mandate at 10), it is clear that Petitioner's counsel failed to timely file a petition for a writ of certiorari in his case – the Supreme Court denied the petition for a writ of certiorari as untimely on July 7, 2006; thus the mandate issued. By not filing a petition for certiorari, he has waived the issue decided in Lopez; i.e., whether his crime is an aggravated felony such that he is ineligible for cancellation of removal.

Second, Petitioner is still removable, even after Lopez, based on his drug conviction. His conviction for possession of cocaine renders him removable today, just as it did when he was in proceedings before the Board and Immigration Judge, as an alien convicted of a controlled substance violation, under 8 U.S.C. 1227(a)(2)(B)(i). The difference in his case after the Supreme Court's Lopez decision is that his crime can no longer be considered an "aggravated felony" for purposes of precluding relief from removal in the form of cancellation of removal pursuant to 8 U.S.C. § 1229b(a)[3]; thus, if the Court had not already dismissed his petition for review and issued its mandate, he would have been at least statutorily eligible for this discretionary form of relief from removal.

However, Petitioner's own actions reveal that if the mandate were not recalled in this case there would be no injustice. Petitioner was lawfully removed from the United States on June 30, 2006. Petitioner admits that "after his deportation, [he] reentered the country. He was apprehended and entered a guilty plea to a charge of illegal reentry." Petitioner's Motion to Recall at 8 n.3.[4] This fact is

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[3] "Cancellation of removal [for lawful permanent residents] is a form of discretionary relief made available by" section 240A(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(a). In order to qualify for it, an alien must demonstrate that he has been lawfully admitted for permanent residence for not less than five years; that he has resided in the United States continuously for seven years after having been admitted in any status; that he has not been convicted of an aggravated felony; and that relief is warranted in the exercise of discretion.

[4] Petitioner does not inform this Court where and when he was convicted; however, it would appear that he plead guilty on September 20, 2006, in the Southern District of Texas, case number 1:06-CR-00702, and that he is to be sentenced on February 20, 2007. The complaint was filed in that case on July 24, 2006. A review of this document on PACER reveals that he was removed from the United States on June 30, 2006, and reentered the United States

important because assuming the mandate were recalled, and assuming this Court then remanded the case back to the Board, which in turn remanded to the Immigration Judge for a hearing on whether Petitioner was eligible for cancellation of removal, it is highly unlikely that he would receive a favorable exercise of discretion since he illegally reentered the United States a mere twenty-six days after his then-lawful removal order was executed. After all, Lopez did not hold that an alien such as Petitioner is no longer removable as a controlled substance violator; Lopez held that a crime such as Petitioner's can no longer be considered an aggravated felony. Thus, Lopez does not change the fact that Petitioner is still removable for having been convicted of a controlled substance violation and that he must still "cancel" his removal in order to remain in the United States. It is also clear that cancellation of removal is an inherently discretionary form of relief, and given the equities in this case, it would be difficult indeed for Petitioner to demonstrate that the equities of his case merit a favorable exercise of administrative discretion, even if this Court were to recall the mandate and remand his case for further consideration. See Mireles-Valdez v. Ashcroft, 349 F.3d 213, 216 (5th Cir. 2003); Garcia-Melendez v. Ashcroft, 351 F.3d 657 (5th Cir. 2003). In addition, it is well-established in this Circuit that no constitutionally protected liberty or property interest exists under the Fifth Amendment in obtaining wholly discretionary relief, such as cancellation of removal. See Manzano-Garcia v. Gonzales, 413 F.3d 462, 467 (5th Cir. 2005), and Assaad v. Ashcroft, 378 F.3d 471, 475 (5th Cir. 2004) (and cases cited therein).

Thus, there is little possibility of an injustice in this case where, despite having a then-lawful removal order, Petitioner illegally reentered the United States and was

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illegally on July 26, 2006. Petitioner asserts in his motion that he is now trying to withdraw his plea.

convicted well before the Supreme Court determined that Petitioner's offense was no longer an aggravated felony.

Respectfully submitted,
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Assistant Attorney General
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LINDA S. WENDTLAND
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(202) 305-0189
ATTORNEYS FOR RESPONDENT

Date: December 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2006, I caused a copy of the above-captioned motion to be served upon the petitioner by Federal Express, next-business-day delivery, addressed to his counsel:

Linda T. Coberly, Esq.
WINSTON & STRAWN, LLP
35 West Wacker Drive
Chicago, IL 60610

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APPENDIX E

No. 05-60779

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSE JAVIER AVALOS-GUTIERREZ,

Petitioner,

v.

ALBERTO R. GONZALES,

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

MOTION TO RECALL THE MANDATE IN LIGHT OF SUPERVENING SUPREME COURT AUTHORITY

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Attorney for Petitioner

INTRODUCTION

In light of the U.S. Supreme Court's decision in *Lopez v. Gonzalez*, No. 05-547 (December 5, 2006) (App. A), Petitioner Jose Javier Avalos-Gutierrez respectfully moves this Court to recall its mandate in Case No. 05-60779. This Court dismissed this appeal earlier this year because of Fifth Circuit authority holding that a state felony conviction for drug possession that would have been a misdemeanor under federal law is an "aggravated felony" under the Immigration and Nationality Act ("INA") and operates as a bar to cancellation of removal. That authority has been rejected by the U.S. Supreme Court in *Lopez*.

As this Court held in *United States v. Tolliver*, a recall of the mandate is appropriate and necessary to prevent injustice either "when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong" or when "'there is a danger of incongruent results in cases pending at the same time.'" 116 F.3d 120, 123 (5th Cir. 1997) (citations omitted). Both of these factors are present here, in light of the Supreme Court's clear holding in *Lopez* and its decision to grant, vacate, and remand fifteen other similar and contemporaneous cases for further consideration in light of *Lopez*. For both of these reasons, Mr. Avalos-Gutierrez respectfully asks that the Court recall its mandate so that he can proceed with his application for cancellation of removal.

PROCEDURAL HISTORY

Mr. Avalos-Gutierrez was a legal permanent resident who, at the time of his deportation, had lived productively for more than 20 years in this country. He was employed as a plumber, paid taxes, and worked to support his family, including two U.S. citizen children. He and his family lived near his parents, grandparents, and many extended family members in Brownsville, Texas.

In 1996, Mr. Avalos-Gutierrez was charged in state court with possessing cocaine in the amount of less than one gram. He entered a guilty plea under Texas's deferred adjudication

statute and agreed to a period of probation and to attend a treatment program. This was Mr. Avalos-Gutierrez's first offense, and he ultimately satisfied all of his obligations under the deferred adjudication plea agreement.

The Government commenced removal proceedings against Mr. Avalos-Gutierrez on April 30, 1997. The removal was based on 8 U.S.C. § 1227(a)(2)(B)(i), which authorizes removal when the immigrant has been convicted of a controlled substance violation. The Immigration Judge terminated the removal proceedings based on its conclusion that an immigrant who received a state deferred adjudication for a first-time drug offense does not have a "conviction" for immigration purposes. R. at 207 (relying on *Matter of Manrique*, 21 I&N. Dec. 58, 64 (BIA 1995)). The BIA reversed, however, citing subsequent BIA authority. R. at 173.

On remand, the Immigration Judge held in relevant part that Mr. Avalos-Gutierrez was ineligible for cancellation of removal under Section 240A(a) of the INA because he had been convicted of an offense amounting to an "aggravated felony." App. B. Mr. Avalos-Gutierrez appealed, and the BIA affirmed without opinion. R. at 100. He then filed a petition for writ of habeas corpus in the U.S. District Court for the Southern District of Texas to review that decision. *See* App. C (attaching BIA decision).[1]

Mr. Avalos-Gutierrez later returned to the BIA to file a Special Motion to Seek 212(c) Relief, arguing that he was eligible to apply for Section 212(c) relief under newly promulgated regulations. R. at 15-98. The BIA denied his motion. R. at 10. Mr. Avalos-Gutierrez filed a petition for review of that decision with this Court, and the case was assigned No. 05-60496. On June 30, 2005, the Government moved to dismiss the petition in Case No. 05-60496 for lack

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[1] An appendix of key materials has been filed for the Court's convenience. To avoid duplication and excessive volume, not all of the exhibits to the various court papers have been included.

of jurisdiction based on alleged defects on the face of that petition for review.

Just over a month later, on the Government's motion, the district court transferred Mr. Avalos-Gutierrez's habeas petition to this Court pursuant to the REAL ID Act, and it was assigned Case No. 05-60779. The Government did not move to dismiss Case No. 05-60779, although the motion to dismiss in the earlier case was also entered on the docket of No. 05-60779.

On January 24, 2006, both appeals were dismissed. App. D (order). Concerned that the dismissal of Case No. 05-60779 may have been a clerical error, counsel for Mr. Avalos-Gutierrez consulted with the Clerk concerning how to raise the issue. At the Clerk's suggestion, counsel promptly filed a Motion to Reopen and Set Briefing Schedule in Case No. 05-60779, on the ground that transferred habeas petition clearly fell within this Court's jurisdiction and should not have been dismissed. App. E.

The Government opposed the motion, arguing that all the claims in the transferred habeas petition—and chiefly the claim that the state possession felony was not an "aggravated felony" under the INA—were foreclosed by previous Fifth Circuit decisions and thus the Court could and should decline jurisdiction over the transferred habeas petition as well. App. F. In reply, Mr. Avalos-Gutierrez challenged that assertion and argued that the REAL ID Act gave the Court jurisdiction over the habeas petition. App. G at 2-3. He also argued that his "aggravated felony" claim was at least a colorable claim, given that several other federal courts of appeals had adopted his position. *Id.* at 5-8. The reply pointed out that several petitions for certiorari on that issue were then pending before the U.S. Supreme Court, and the Solicitor General had acquiesced in those petitions, agreeing that Supreme Court review was warranted. *Id.* at 7.

On April 3, 2006, this Court issued a one-sentence order denying Mr. Avalos-Gutierrez's motion to reopen. *See* App.

H. The only possible basis for this ruling was that the Court accepted the Government's argument that jurisdiction was lacking because the claims—including the "aggravated felony" claim—were not "colorable" under Fifth Circuit law.

On the very same day, however, the U.S. Supreme Court granted certiorari in *Lopez v. Gonzales* (No. 05-574).[2] The issue presented in *Lopez* was whether the simple possession of a controlled substance that is a felony under state law (but would only be a misdemeanor under federal law) is an "aggravated felony" for immigration purposes. Mr. Avalos-Gutierrez's transferred petition indisputably raised that very same issue.

Promptly after learning of the denial of the motion to reopen, the undersigned counsel conferred with counsel for the Government and obtained his consent to a motion for reconsideration, based on the Supreme Court's decision to grant review in *Lopez*. That "***Unopposed*** Motion for Reconsideration" was submitted to the Court on April 17, 2006, and sought an order reopening the case and holding it open until the Supreme Court rendered its decision in *Lopez*. Shortly thereafter, counsel for Mr. Avalos-Gutierrez received the motion back in the mail from the Clerk, with a notation indicating that the case was closed and the motion would not be docketed. App. I (letter and copy of motion). By that time, the time to file a petition for certiorari from the January 24 dismissal order had run.

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[2] The Court also granted certiorari in *Toledo-Flores v. United States* (05-7664), which was a Fifth Circuit case that presented the same question in the context of the Sentencing Guidelines. The two cases were briefed and argued together. Although the Court ultimately dismissed the *Toledo-Flores* case as improvidently granted (most likely because of mootness concerns in that particular case), the Court's holding in *Lopez* applies in the sentencing context as well. App. A, Slip. Op. at 2 (discussing cancellation of removal and the Sentencing Guidelines as two different contexts in which the definition of "aggravated felony" will have an impact).

In late July 2006, counsel for Mr. Avalos-Gutierrez filed a Renewed Motion for Reconsideration. App. J. This motion was based on the fact that the Government had since disavowed the position it had taken in this case with regard to whether a habeas petition like Mr. Avalos-Gutierrez's may be dismissed for lack of jurisdiction when it appears that the legal claim is foreclosed under the law of this Circuit. The Solicitor General of the United States had filed a response to a petition for certiorari in the case of *Galindo-Pena v. Gonzalez*—another, nearly identical case from this Circuit that had been dismissed less than two weeks before this one. *See* App. K (Brief for the Respondent in *Galindo-Pena v. Gonzalez*, No. 05-1276 (filed July 2006)). The Solicitor General's brief acknowledged that the REAL ID Act "definitively resolved" the question whether this Court has jurisdiction to review constitutional issues and issues of law, including whether a state possession felony is an "aggravated felony" for purposes of federal immigration law. *See* App. K at 6. Thus, he said, "neither petitioner nor the government disputes that the court of appeals had jurisdiction to review petitioners' legal arguments that their drug possession offenses are not 'aggravated felonies.'" *Id.* He further urged the Supreme Court to hold that case for consideration in light of the *Lopez* case. *Id.* at 9.

The Clerk docketed the Renewed Motion for Reconsideration, but the motion was denied by order of this Court on August 16, 2006. App. L.

Several months ago, Mr. Avalos-Gutierrez and his family were deported without warning. He and his family—along with at least one of his U.S. citizen children—were taken to Mexico and deposited without their possessions. [3]

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[3] After his deportation, Mr. Avalos-Gutierrez reentered the country. He was apprehended and entered a guilty plea to a charge of illegal reentry, though he reserved the right to challenge his deportation based on the Supreme Court's resolution of the aggravated felony issue. He has not yet been sentenced and is

Significantly, however, the deportation in no way moots this appeal. Indeed, the appellant in the *Lopez* case in the Supreme Court had been deported also, and the Court specifically held that "the case is not moot" despite the appellant's deportation, because the appellant could still benefit from the relief granted by the Court by pursuing his application for cancellation of removal. App. A., Slip. Op. at 3, n.2.

THE STATUTES AND THE *LOPEZ* DECISION

The *Lopez* case involved a legal permanent resident who, like Mr. Avalos-Gutierrez, had been convicted of a state drug possession felony that did not involve any element of "trafficking." Because this crime was a "controlled substance violation" under 8 U.S.C. § 1227(a)(2)(B)(i), it was grounds for deportation. When Mr. Lopez sought relief known as "cancellation of removal," however, the Immigration Judge concluded that he was ineligible for that relief because his conviction was an "aggravated felony" under the INA. App. A at 3 (citing 8 U.S.C. § 1229b(a)(3), which makes a "aggravated felony" a disqualifier for cancellation of removal). The term "aggravated felony" in the INA applies to state convictions as well as federal ones. 8 U.S.C. § 1101(a)(43). The INA defines the term to include "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c)(2) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act." The Government had taken the position—both in *Lopez* and in the instant case—that a state possession felony is a "felony punishable under the Controlled Substances Act" even if the Controlled Substances Act would punish that offense only as a misdemeanor. That question was the subject of a deeply entrenched split in the Circuits, with the Eighth and Fifth

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presently attempting to withdraw his plea in light of the *Lopez* decision.

Circuits (among others) on the Government's side. App. A, Slip Op. at 3 (citing *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997)). The Court granted certiorari to resolve that split.

In an 8-1 decision, the Court rejected the position adopted by the Fifth and Eighth Circuits. The Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." App. A, Slip. Op. at 12. Thus "conduct made a felony under state law but a misdemeanor under the Controlled Substances Act" cannot be an "aggravated felony" for purposes of the INA and does not render an immigrant ineligible for cancellation of removal. *Id.* at 1-2.

Within days of its decision in *Lopez*, the Supreme Court granted certiorari in a number of cases presenting the same issue, and in each case it vacated the judgment and remanded for further consideration in light of *Lopez*. *See* App. M. Among those were fifteen cases out of the Fifth Circuit, all of which were pending in this Court at the same time as Mr. Avalos-Gutierrez's case.

DISCUSSION

This Court may recall its mandate if necessary to prevent injustice. *See* Fifth Circuit Rule 41.2. As this Court has recognized, "[a]n example of such an injustice is when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong." *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) (citing *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 278 n.12 (D.C. Cir. 1971)); *see Estate of Lisle v. Comm'r of Internal Revenue*, 431 F.3d 439 (5th Cir. 2005) (applying *Tolliver* outside the criminal context). That is precisely what has happened here.

In *Tolliver*, this Court considered a motion to recall the mandate filed by a defendant in a criminal case after the Supreme Court issued a decision in a different case that

conflicted with this Court's judgment. This Court had previously affirmed the conviction of defendant Glenn Metz and his co-defendants under 18 U.S.C. § 924(c)(1), which punishes any person who uses or carries a firearm during and in relation to any drug trafficking crime. Shortly thereafter, the Supreme Court issued its decision in *Bailey v. United States*, 516 U.S. 137 (1995), which effectively overruled the Fifth Circuit's precedent with regard to the "use" requirement of Section 924(c)(1). Two years later—when this Court was reconsidering its judgment against the other co-defendants on remand after their petitions to the Supreme Court—Metz filed a motion to recall the mandate against him, arguing that this Court's disposition of his firearms conviction was squarely in conflict with *Bailey*. This Court granted the motion, holding that a recall of a mandate is necessary to prevent injustice "when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong." 116 F. 3d at 123.

The same is true here. As discussed above, the Supreme Court held in *Lopez* that "conduct made a felony under state law but a misdemeanor under the Controlled Substances Act" is ***not*** a "'felony punishable under the Controlled Substances Act'" and thus cannot render a legal permanent resident ineligible to receive cancellation of removal. App. A., Slip Op. at 1. Mr. Avalos-Gutierrez's conduct may have been punishable as a felony under state law, but it would only have been a misdemeanor under federal law. *See* 21 U.S.C. § 844(a) (a person convicted of simple possession shall be sentenced to a prison term of not more than one year, subject to certain exceptions not relevant here); 18 U.S.C. § 3559(a)(6) (offense punishable by a term of imprisonment of one year or less is a Class A misdemeanor). Thus there can be no dispute that Mr. Avalos-Gutierrez's conviction was not an "aggravated felony" for purposes of Section 101(a)(43)(B) of the INA, and it did not render him ineligible for cancellation of removal. The Immigration Judge's decision and the BIA's affirmance—along with this Court's

summary dismissal of the transferred habeas petition seeking review of that BIA decision—are all demonstrably wrong in light of the Supreme Court's decision in *Lopez*.

Moreover, recall of the mandate is also necessary and appropriate here to avoid inconsistent results in cases pending at the same time, where the only difference between the cases is whether the petitioner sought certiorari following this Court's decision. As this Court held in *Tolliver*, "[r]ecalling the mandate is also appropriate 'where there is a danger of incongruent results in cases pending at the same time.'" 116 F.3d at 123 (quoting *American Iron & Steel Inst. v. Environmental Protection Agency*, 560 F.2d 589, 594 (3d Cir. 1977)). Following the initial appellate decision in that case, two of the co-defendants sought certiorari while a third (defendant Metz) did not. After issuing its decision in *Bailey*, the Supreme Court granted and vacated the judgments for the two petitioning co-defendants and remanded for further consideration in light of *Bailey*. When Metz later sought to recall the mandate, this Court held that under these circumstances, failing to recall the mandate as to Metz to allow him to benefit from the decision in *Bailey* would result in an unjust incongruity of results. 116 F.3d at 123-24; *see also Gradsky v. United States*, 376 F.2d 993, 995 (5th Cir. 1967) (when certain co-defendants petitioned for certiorari and obtained a remand, this Court granted motions to recall the mandate for other, non-petitioning co-defendants to allow them to join in the proceedings); *United States v. Fraga-Araigo*, 281 F.3d 1278 (5th Cir. 2001) (table) (to avoid inconsistent results in cases pending at the same time, this Court granted a motion to recall the mandate and vacated and remanded the judgments below for resentencing based on an intervening Fifth Circuit decision); *United States v. Rangel-Mendoza*, No. 00-40561, 2001 U.S. App. LEXIS 21955 (5th Cir. Oct. 1, 2001) (same);

Mr. Avalos-Gutierrez's claim for recall of the mandate is at least as strong. As discussed above, Mr. Avalos-Gutierrez was one of many individuals with identical challenges

pending in this Court at the same time. Fifteen of those individuals filed petitions for certiorari, and the Supreme Court has granted those petitions, vacated the judgments, and remanded the cases for further consideration in light of *Lopez*. App. M. The remanded cases include *Salazar-Regino v. Trominski*, 415 F.3d 436 (5th Cir. 2005), on which the Government relied heavily in arguing that Mr. Avalos-Gutierrez's "aggravated felony" argument was foreclosed by this Court's previous cases and that his appeal should not be reopened. *See* App. F at 3-5.

The Supreme Court has also vacated the judgment and remanded in the case of *Galindo-Pena v. Gonzalez*, No. 15-1276 (5th Cir. No. 05-60908), which this Court dismissed less than two weeks before it dismissed Mr. Avalos-Gutierrez's appeal. While counsel for Mr. Avalos-Gutierrez pursued reconsideration in this Court—in light of the confusion over whether the Court had truly intended to dismiss the transferred habeas petition along with the separate petition for review that had been the subject of the Government's motion to dismiss—counsel for *Galindo-Pena* filed a petition for certiorari with the U.S. Supreme Court. In its response to that petition, the Government agreed that the case was within this Court's jurisdiction and should not have been dismissed, and it recommended that the case be held for consideration in light of the Supreme Court's resolution of *Lopez*. The Court took that recommendation and has now sent the case back to be decided in light of *Lopez*. App. M.

To permit the mandate to stand in Mr. Avalos-Gutierrez's case would create the very same sort of incongruity and injustice that this Court sought to avoid in *Tolliver*. This Court will soon be applying the law set out in *Lopez* in a large number of cases that were pending at the very same time as Mr. Avalos-Gutierrez's case—including the very case the Government relied upon in securing the result here. To treat Mr. Avalos-Gutierrez differently would be extraordinarily unjust. Under *Tolliver*—and to prevent a grave injustice to Mr. Avalos-Gutierrez—this Court should recall its mandate

in this case and grant Mr. Avalos-Gutierrez the relief to which he is entitled under *Lopez*.

CONCLUSION

In light of the Supreme Court's recent decision in *Lopez*, it is now clear that Mr. Avalos-Gutierrez's transferred petition for habeas corpus should not have been dismissed and that the BIA's decision in this case cannot stand. Other immigrants whose cases were pending at the same time as Mr. Avalos-Gutierrez's case will receive the benefit of *Lopez*, and it would be extraordinarily unjust to deny Mr. Avalos-Gutierrez that same benefit. For all these reasons, Mr. Avalos-Gutierrez respectfully asks that this Court recall its mandate in the above-captioned case and enter an order reversing the judgment of the BIA. In the alternative, Mr. Avalos-Gutierrez asks that his appeal be reopened and set for briefing and argument.

RULE 27.4 CERTIFICATION

The undersigned counsel has contacted counsel for the Government (Respondent) concerning this motion. At this time, counsel for Respondent has not taken a position on this motion.

Respectfully Submitted,

Linda T. Coberly
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60610
(312) 558-8768
Attorney for Petitioner

Date: December 14, 2006

CERTIFICATE OF SERVICE

I, Linda T. Coberly, hereby certify that two copies of the foregoing Motion and the associated Appendix were mailed, first class postage prepaid, to the following on this 14th day of December, 2006:

Mr. John S. Hogan
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

_____

Linda T. Coberly

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 16, 2006
CHARLES R. FULBRUGE III
CLERK

No. 05-60496

JOSE JAVIER AVALOS-GUTIERREZ
PETITIONER

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL
RESPONDENT

Petition for Review of an Order of the
Board of Immigration Appeals

Before SMITH, GARZA, and PRADO, Circuit Judges:

PER CURIAM:

This panel previously denied petitioner's motion to reopen case and to set briefing schedule for the second petition for review, etc. This panel has considered petitioner's motion for reconsideration of the court's April 3, 2006 order. IT IS ORDERED that the motion is DENIED.

IT IS FURTHER ORDERED that petitioner's request to hold case 05-60779 open at least until the Supreme Court issues its decision in Lopez vs. Gonzales (No. 05-574) and Toledo-Flores vs. United States (No. 05-7664) and the parties have had the opportunity to apprise the Court of the significance is DENIED.

MOT-29AAGENCY _____/S/____/S/____/S/____

APPENDIX G

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL: 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

NOTICE: The clerk's office is moving permanently to 600 S. Maestri Place, New Orleans, LA 70130 in June, 2006. All correspondence expected to arrive at the court on or after April 24, 2006 must be sent to this address.

April 22, 2006

Ms Linda T. Coberly
Winston & Strawn
35 W Wacker Drive
Chicago, IL 60601

Ms Paula Sue Waddle
South Texas Immigration Council
4793 W Expressway 83
Harlingen, TX 78552

No. 05-60779 Avalos-Gutierrez v. Gonzales
USDC No. A38 095 843

We received your motion for reconsideration on April 18, 2006. This case is closed and the Court has issued its final disposition. Therefore, we are taking no action on this motion.

Sincerely,
CHARLES R. FULBRUGE III, Clerk
By: _____/S/_____
Kim Folse, Deputy Clerk
504-310-7712

cc: Ms. Paula Sue Waddle
Mr. John S. Hogan

BR-9

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60496

U.S. COURT OF APPEALS
FILED
APR 3, 2006
CHARLES R. FULBRUGE III
CLERK

JOSE JAVIER AVALOS-GUTIERREZ
PETITIONER

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL
RESPONDENT

Petition for Review of an Order of the
Board of Immigration Appeals

Before SMITH, GARZA, and PRADO, Circuit Judges

PER CURIAM:

IT IS ORDERED that petitioner's motion to reopen and establish briefing for the second petition for review which was transferred to this Court pursuant to the REAL ID Act, Pub. L. No. 109-13, Div. B, Stat. 302 (2005), is DENIED.

_____/S/_____/S/_____/S/_____
[Illegible]

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60496

U.S. COURT OF APPEALS
FILED
JAN 24, 2006
CHARLES R. FULBRUGE III
CLERK

JOSE JAVIER AVALOS-GUTIERREZ
PETITIONER

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL
RESPONDENT

Petitions for Review of an Order of the
Board of Immigration Appeals

Before SMITH, GARZA, and PRADO, Circuit Judges

PER CURIAM:

IT IS ORDERED that respondent's motion to dismiss petition for review for lack of jurisdiction is GRANTED.

MOT-21A

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

United Status District Court
Southern District of Texas
FILED
FEB 24 2004
Michael N. Milby
Clerk of Court

JOSE JAVIER AVALOS-GUTIERREZ

v. C.A. No. B-04-035
INS A No. 38 095 843

TOM RIDGE, SECRETARY OF DEPT. OF HOMELAND SECURITY,
and
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Jose Javier Avalos-Gutierrez, Petitioner, files the instant Petition for Writ of Habeas Corpus, and shows as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction herein arises under 28 U.S.C. §§2241 (habeas corpus) and 1331 (federal question).

2. The Petitioner Mr. Avalos-Gutierrez is under an administratively final order of removal (See Exhibit A) which order places significant restrictions on his liberty not shared by the populace at large, including the fact that he cannot travel outside of the United States. *Jones v. Cunningham*, 871 U.S. 236, 240 (1963). His immigration proceedings were held and concluded at the Harlingen, Cameron County, Texas, Immigration Court.

3. The Respondent Tom Ridge, as head of the Department of Homeland Security maintains his offices in Cameron County, Texas, within the jurisdiction of this court.

II. THE PARTIES

4. Petitioner Mr. Avalos-Gutierrez has been a legal permanent resident for twenty-two (22) years. He is a year old native and citizen of Mexico who became a legal permanent resident at the age of twenty-four (24) years old. He has a single state court judgment of Deferred Adjudication on June 25, 1996 for possession of a controlled substance, less than 1 gram of cocaine, occurring in Cameron County, Texas, for a criminal act occurring on February 24, 1996.

5. Respondent Tom Ridge is the Secretary, Department of Homeland Security, Cameron County, Texas (herein "DHS"). He is sued in his official capacity only.

6. Respondent John Ashcroft is the Attorney General of the United States. He is also sued in his official capacity only.

III. THE FACTS

7. Petitioner Mr. Avalos-Gutierrez was admitted to the United States as a lawful permanent resident (herein "LPR") when he was twenty-three (23) years old, on or about 1982.

8. On or about June 25, 1996, he was given Deferred Adjudication for first time possession of a controlled substance, cocaine, for five (5) year term.

9. Immigration proceedings against Petitioner began on April 30, 1997 charging removability based on a violation of law involving controlled substances which Petitioner denied. He was never charged with having committed an aggravated felony. Proceedings were terminated on September 3, 1997, and the U.S. Immigration and Naturalization Service appealed.

10. About five (5) years later, the Board of Immigration Appeals (BIA) issued its opinion on June 11, 2002, sustaining

the termination of proceedings, and remanding to the Immigration Judge for further proceedings. A copy of the first BIA decision is attached as Exhibit A hereto. On remand, Petitioner sought to file an Application for a Waiver or for Relief under Sec. 212(c) and/or for Administrative Closure of the case pending the issuance of final regulations for Sec. 212(c) relief, which would, if enacted as proposed by the U.S. Attorney General, extend the eligibility for relief under 212(c) to those with convictions to April 1, 1997, allowing Mr. Avalos-Gutierrez to qualify for a waiver. The Immigration Court denied the request. The Immigration Court also determined that Petitioner was not eligible for Cancellation of Removal for Legal Permanent Residents, because he has an aggravated felony conviction, and ordered Petitioner removed from the U.S. Appeal to the BIA followed and it upheld the decision of the Immigration Court in a decision without opinion, as attached hereto as Exhibit B. This petition timely follows that decision.

11. Petitioner alleges that except for the administrative proceedings detailed herein, he has sought no court review of the validity of any immigration court order or BIA decision prior to the filing of this instant suit. He has not been deported from the United States.

12. The Petitioner exhausted his administrative remedies without having an opportunity to present his claim for relief under Immigration and Nationality Act, 8 U.S.C. 1229 B(a), cancellation of removal for legal permanent residents, or for a Sec. 212(c) waiver. Mr. Avalos-Gutierrez urges that because he has lived in the United States for many years, because of his many United States citizen and legal permanent resident family members living in South Texas, because of his single offense, he should be allowed to file an application for a Waiver under Sec. 212(c) or file an Application for Cancellation of Removal under Sec. 240Aa for legal permanent residents.

13. Because Mr. Avalos-Gutierrez has substantial roots in the United States, has many family members here, it is likely that he would have qualified for cancellation of removal or for relief under 212(c) had either form of relief been heard on the merits.

14. From the time of Petitioner's criminal conduct and subsequent involvement in immigration courts, from February, 1996 to the first Immigration Judged decision on September 3, 1997 to the present, several significant legal developments in immigration law impacted this case as follows:

✓On March 3, 1999, the BIA decided that *Manrique*, 21 I & N Dec. 58 (BIA 1995) had been superseded by 8 USC Sec. 1101(a)(48)(A). *Matter of Roldal*, Int. Dec. 3377 (BIA 1999).

✓Then on May 11, 2001, in *U.S. vs. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001), the Fifth Circuit held that felony possession of a controlled substance constituted an aggravated felony and opined that uniformity would be promoted if the interpretation of the sentencing guidelines were applied to immigration cases.

✓Finally, in 2002, the Board ruled in *Matter of Yañez*, 23 I&N Dec. 390 (BIA 2002) that it will defer to the law of the federal circuit court to determine whether or not a drug trafficking offense is an aggravated felony.

15. Upon information and belief, Petitioner alleges that a significant number of legal permanent residents (herein LPRs) who were otherwise similarly situated, in that they plead guilty to a criminal offense involving simple first time possession of marijuana have either: 1) Received *Manrique* treatment and their proceedings were terminated without further appeal; or 2) filed for and received cancellation of removal.

IV. THE CAUSE OF ACTION HABEAS CORPUS

Petitioner reasserts and incorporates by reference paragraphs 1-15 herein.

Petitioner Mr. Avalos-Gutierrez asserts that the removal order violates the laws and Constitution of the United States, which claims are cognizable in habeas corpus under 28 U.S.C. §2241.

1. *Impermissible Retroactive Application of Law*

Petitioner alleges that the law has been applied in such an impermissible retroactive manner to him that he has been ordered deported on a ground on which he has never even charged. Two BIA decisions, the 2002 and the 2004 Board decisions violated his due process rights and federal law as enunciated in *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L. Ed. 2d 347 (2001). Mr. Avalos-Gutierrez urges that the interpretation of the law, as reflected in each BIA decision, constitutes retroactive application of the law to him. At the time of his conviction, at the time the Notice to Appear issued (which does not even allege the commission of an aggravated felony as grounds for removal), at the time of the first immigration court order of termination of proceedings, under the law of the circuit, the Petitioner was eligible to have the proceedings terminated and he remained eligible for cancellation of removal with no statutory bar due to an aggravated felony. Not until 2001, approximately five (5) years after his crime, did a circuit court determine that a similar act constituted an aggravated felony in the illegal reentry context. Without any aggravated felony allegation ever made ever being made [sic] against Petitioner, that has been determined to be the grounds of his removability.

2. *Statutory Construction*

a. Aggravated Felony

Mr. Avalos-Gutierrez urges that the BIA erred as a matter of law in determining that his conviction for simple first-time possession constitutes an aggravated felony, if in fact that was the basis holding 2004 decision affirming the 2003 decision (because the BIA did so without opinion its exact basis is unknown). The conviction is for an amount under one (1) gram which is a *de minimis* quantity. The NTA

does not allege an aggravated felony. There is no allegation of or evidence of drug trafficking, especially considering the quantity involved, under one gram. The charge, guilty plea and judgment all relate to simple possession of cocaine under one (1) gram. Until the immigration court decision of November 14, 2002, approximately six and one-half (6 ½) years after the criminal act, no prior immigration court had determined that the first time simple possession conviction constituted an aggravated felony in this case. The aggravated felony was never charged or admitted by the Petitioner, but the alleged aggravated felony serves as the basis for the denial of the cancellation of removal application, and as the basis for removability.

b. Definition of Conviction

Petitioner further contends that the BIA, as a matter of law, incorrectly interpreted the meaning of as well as the Congressional intent of 8 U.S.C. 1101(a)(48)(A), as amended in 1996. Specifically, Mr. Avalos-Gutierrez urges that Congress did not intent to repeal the Federal First Offenders Act as applied to immigrants and/or Congress did not intent by its re-definition of "conviction" to include cases, such as Petitioner's, who have received deferred adjudication from a state criminal court for a first time, simple possession of a controlled substance with no element or suggestion of drug trafficking in the offense as charged or convicted.

3. Equal Protection

i. Differing Results Depending of Federal or State Criminal Prosecution

Petitioner Avalos-Gutierrez also claims that the BIA's interpretation of the law as applied to this case violates equal protection because the Board interpretation turns on whether the immigrant was brought into state or federal court as to whether the Federal First Offender Act applies. Especially variable is the different treatment of this crime, possession of under one (1) gram of cocaine, so that the result may be a minimal sentence.

ii. Differing Results in Different Circuit Jurisdictions

Given the national scope of U.S. immigration law, Mr. Avalos-Gutierrez also asserts that it violates equal protection for the result of his case to hinge solely on the particular federal circuit in which removal proceedings are held. Had Mr. Avalos-Gutierrez been in immigration proceedings in the Ninth Circuit, for example, he would not have been subject to removal at all; had the proceedings been begun in the Third or Eleventh Circuits, he would have been eligible to apply for cancellation of removal. Petitioner would further show that other immigrants whose immigration proceedings arose within the Fifth Circuit, and who successfully transferred venue to other immigration courts located in certain other circuit courts have prevailed on their cancellation of removal claims.

iii. Different Results Due to Timing of Proceedings

Mr. Avalos-Gutierrez would show that the treatment of his case has depended on the timing of law changes and court rulings. This is best exemplified in the instant proceeding itself, in which the 2002 BIA decision, *Matter of Yañez*, op. cit., serves as the basis for the Board Decision. The BIA has completely ignored the *St. Cyr*, op. cit. decision of the U.S. Supreme Court of 2001, in its decision. Other varying results were also possible, based on court rulings in other cases, depending upon the date of hearing, date of law changes and date of court rulings. Some of these possibilities include:

Timing of Statute/Court Decisions	*Result*
Until 1999	*Manrique* available
Between January, 1999-May 11, 2001	Cancellation of Removal Hearing

Petitioner Avalos-Gutierrez acknowledges that he sought termination under the prevailing law at the time, which was granted to him; but he also believes that if he had received the cancellation of removal hearing he probably would have

received the grant of the relief sought from the Immigration Court. It violates equal protection for the result of whether Mr. Avalos-Gutierrez is given an immigration court merits hearing and allowed the possibility of remaining in the United States, or instead is denied a merits hearing and barred from continued lawful permanent resident status, separated from his family and permanently barred from returning to the United States, based solely on the timing of immigration proceedings. Even after *Manrique, op. cit.* was decided many other LPRs with the identical offense, it may be shown, received cancellation of removal until 2001.

4. Substantive Due Process

Petitioner Mr. Avalos-Gutierrez further and/or in the alternative asserts that a deportation of him from the United States would violate a fundamental liberty interest which he has to live and work in the United States and a right to unite with his family within the United States. *Landon vs. Plasencia,* 459 U.S. 21, 34 (1982); *Bridges vs. Wixom,* 826, U.S. 326 U.S. 135, 154 (1945). In *Plasencia,* the Court wrote:

> Plasencia's interest here is, without question, a weighty one. She stands to lose the right "to stay and live and work in this land of freedom....Further she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual. *Op. cit.* P.34.

As a lawful permanent resident, Mr. Avalos-Gutierrez enjoys the same Due Process rights, including substantive Due Process rights.

A violation of the constitutional protection to substantive due process exists when a provision, or a combination of provision, such as exists in this case operate together to create an unjustifiable conclusive presumption which is so broad that it does not meet a compelling state interest. *Unites States v. Salerno,* 481 U.S. 739, 747 (1987). In the instant case, the 1996 law changes brought by the Antiterrorism and

Effective Death Penalty Act of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act, which re-defined 8 U.S.C. Sec. 1101(a)(48)(A) regarding "conviction" and 8 U.S.C. 1229 B(a) which denied discretionary relief to anyone with an aggravated felony with the statutory and court established overly broad and variable definitions of that term, all create an unconstitutional presumption that all lawful permanent residents who have such a court adjudication should be barred from the United States, even when the state criminal system has determined that it is appropriate as a first time offender with a simple, non-assaultive situation to forego an adjudication of guilt and to grant community supervision in a case of de minimis possession.

5. Procedural Due Process

Petitioner Mr. Avalos-Gutierrez, additionally and/or in the alternative, urges that the Board's decision deprives him of procedural due process as required by the U.S. Constitution. *Reno v. Flores*, 507 U.S. 292, 306 (1993). The Petitioner asserts an entitlement to "fair notice" of a law change. In Mr. Avalos-Gutierrez' case, at the time of his criminal conduct, at the time of the deferred adjudication, and when immigration proceedings began and were concluded by termination of proceedings, relief was available. But by the BIA delay in rendering a decision, and by applying the interpretation of law retroactively and selectively, the BIA was able to hold that only removal remained an option. This result could not have been contemplated at the time of Mr. Avalos-Gutierrez' guilty plea or at the time the immigration proceedings were initiated, as shown by the NTA (Exh. C herein) which itself does not charge removability based upon an aggravated felony. The concept of fair notice also applies to the charges against one. The right to know and to defend against charges applies not just to criminal cases but also to civil penalties, such as removal. The U.S. Supreme Court has

addressed the impermissible retroactive change in a civil penalty in *BMW vs. Gore*, 517 U.S. 559, 574 (1996). It stated:

> Elementary notice of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

Because Mr. Avalos-Gutierrez has no notice of the civil penalty - deportation - facing him at the time he plead guilty, because the penalty is much harsher than it was at the time of either his criminal conduct and/or the date of the conviction, and because the NTA did not even charge the ground of removal on which Petitioner is ordered removed, the decisions violate procedural due process. Finally, the January 30, 2004, decision fails to state the ground(s) on which it is based. Petitioner is without notice of the grounds on which the BIA affirmed the immigration court decision. He cannot properly address the BIA decision. This legal permanent resident in the U.S. from a young age has suffered repeated constitutional law violations since his 1996 guilty plea.

6. International Law and Treaty Obligations

As an additional or alternative basis for the granting of the Writ of Habeas Corpus, Petitioner Mr. Avalos-Gutierrez would show that the BIA decision violates international law and treaty obligations between the United States and Mexico, Mr. Avalos-Gutierrez' birth place. *Universal Declaration of Human Rights*, INS Doc. A/811, Part III Articles 13, 15 and 26 (1948).

7. BIA Decision Violates Due Process and Administrative Procedures

The BIA decision "affirms, without opinion, the results of the decision below." (Exh. B). Thus, the decision stripping the Petitioner of his long-held legal status consists of two

lines. Such an opinion, without more, violates the due process and the administrative procedure rights of Mr. Avalos-Gutierrez. This procedure interferes with Mr. Avalos-Gutierrez' right to a reasoned decision and it also fails to provide this Honorable Court with any basis for the BIA decision which this Court might review. This Honorable Court cannot determine whether the agency abided by its own regulations in rendering its decision, or on what basis it affirmed the Immigration Court decision. In addition, Mr. Avalos-Gutierrez would show that the raised new arguments with the BIA which were not argued before the Immigration Judge; because of the nature and manner of the BIA Decision, Petitioner urges that this Honorable Court cannot evaluate the legality of the BIA review, of the decision of the court below as well as of the new arguments raised by the Petitioner on appeal. Because of the failure of the BIA to render a reviewable decision, the Writ should issue.

V. PRAYER

Wherefore, the Petitioner prays that this Court grant the following:

1) Assume jurisdiction over this matter;

2) Stay any removal of Petitioner;

3) Declare the BIA Decisions void and unlawful and set them aside;

4) Order that Petitioner's immigration case be reopened and that Petitioner be granted a cancellation of removal merits hearing on the merits;

5) Order that Petitioner's legal permanent residency card be returned to him; and

6) Grant any other relief which this Court deems just and proper.

Respectfully submitted,

_____/S/_____

Paula S. Waddle, Attorney in Charge
South Texas Immigration Council
107 N. 3rd
Harlingen, TX 78550
(956) 425-6987
(956) 425-7434 (fax)
State Bar No. 26030400
Fed. I.D. No. 5674

VERIFICATION

I, Paula S. Waddle, hereby certify that I am familiar with the removal case of the named Petitioner, and that the facts as stated with respect thereto are true and correct to the best of my knowledge and belief.

_____/S/_____
Paula S. Waddle
February 23, 2004

CERTIFICATE OF SERVICE

I, Paula S. Waddle, hereby certify that a copy of the foregoing was mailed FIRST CLASS MAIL to Mr. Steve Schmelle, AUSA, 1701 W. Highway 83, Suite 600, TCB-Bentsen Tower, at McAllen, Texas 78501, on the 24th day of February, 2004.

_____/S/_____
Paula S. Waddle

APPENDIX K

United States Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A38-095-843 HARLINGEN Date: Jan. 30, 2004

In re: AVALOS-GUTIERREZ, JOSE JAVIER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Waddle, Paula S.

ON BEHALF OF DHS: Cheri L. Jones, ADC

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

_____/S/_____
Roger D. Paul
FOR THE BOARD

APPENDIX L

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Harlingen, Texas

File No.: A 38 095 843

November 14, 2002

In the Matter of

JOSE JAVIER AVALOS-GUTIERREZ, Respondent	)))	IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(B)(i) Immigration and Nationality Act

APPLICATION: Section 212 (c) Immigration and Nationality Act

ON BEHALF OF RESPONDENT:
Paula Waddle, Esquire

ON BEHALF OF SERVICE:
Sean Clancy, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The Immigration Service issued a Notice to Appear with respect to respondent on April 30, 1997, and properly served it upon him (Exhibit 1). The Notice to Appear alleges that respondent is not a citizen or a national of the United States and that he is a native and citizen of Mexico who was admitted to the United States at Brownsville, Texas, on or about December 17, 1982, as an immigrant. It is further alleged that on June 25, 1996, respondent was convicted in the 107th Judicial District Court of Cameron County, Texas, for the offense of possession of a controlled substance, cocaine, less than one gram, in violation of Section 481.115 of

the Texas Penal Code. It is charged in the Notice to Appear that respondent is subject to removal from the United States under Section 237(a) (2) (B) (i) of the Immigration and Nationality Act (the Act). Respondent admitted the allegations in the Notice to Appear that he is not a citizen or a national of the United States and that he is a native and citizen of Mexico who was admitted to the United States at Brownsville, Texas, on our about December 17, 1982, as an immigrant. Respondent denied the allegation in the Notice to Appear relating to the alleged criminal conviction and also denied the charge of removability.

On September 3, 1997, the Court issued a decision in this case terminating the removal proceedings. The Immigration Service filed an appeal of that decision to the Board of Immigration Appeals. On June 11, 2002, the Board of Immigration Appeals issued a decision finding that the respondent has a conviction for purposes of the Immigration law for possession of a controlled substance cocaine, and that respondent is deportable as charged in the Notice to Appear pursuant to Section 237(a) (2) (B) (i) of the Act. Therefore, the issue of removability has been resolved by the decision of the Board of Immigration Appeals. The Board of Immigration Appeals remanded the case to the Court for further proceedings and the entry of a new decision.

Pursuant to the decision of the Board of Immigration Appeals, the Court provided the respondent with an opportunity to request relief from removal. Respondent selected Mexico as the country for removal if removal is ordered. Respondent requested relief from the removal pursuant to Section 212(c) of the Act, which is a waiver of removability. Although respondent did not specifically request cancellation of removal for certain permanent residents pursuant to Section 240(a) of the Act, in the brief filed by respondent with the Court on November 12, 2002, respondent does mention that relief of cancellation of removal for certain permanent residents and the Court will speak to whether the respondent is eligible to apply for

cancellation of removal for certain permanent residents. In addition, respondent has applied for administrative closure in the alternative.

With respect to respondent's request to apply for a waiver of removability under Section 212(c) of the Act, it is noted that Section 212(c) was repealed by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which was enacted on September 30, 1996. Therefore, relief under Section 212(c) is generally not available to a respondent in a removal proceeding. However, in the case of INS v. St. Cyr, 121 Supreme Court 2271 (2001), the United States Supreme Court determined that in certain circumstances an individual could apply for Section 212(c) relief in a removal proceeding. In that case the Court held that Section 212(c) relief remains available for individuals whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for Section 212 (c) relief at the same time of their plea under the law then in effect. The Court will determine whether respondent is eligible to apply for Section 212(c) relief in this removal proceeding pursuant to INS v. St. Cyr.

The record of this removal proceeding demonstrates that respondent pled guilty on June 25, 1996, in the District Court of Cameron County, Texas, 107th Judicial District, where he was charged with possession of cocaine (Group Exhibit 2). On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 was enacted into law. Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act became effective on that date, April 24, 1996. Section 440(d) amended Section 212(c) relief is not available to an individual deportable by reason of having committed any criminal offense covered in Section 241(a) (2) (B) of the Act (as in effect prior to April 1, 1997). The Court concludes that respondent's conviction for possession of cocaine made him deportable at the time of his plea of guilty on June 25, 1996, by reason of having committed the criminal offense covered

in Section 241(a) (2) (B) of the Act. Therefore, at the time of respondent's plea of guilty to the charge of possession of cocaine, respondent was not eligible to apply for a waiver under Section 212(c) of the Act. Accordingly, respondent is not eligible to apply for Section 212(c) relief in this removal proceeding pursuant to INS v. St. Cyr, supra. Accordingly, respondent's request to be allowed to apply for relief under Section 212(c) is pretermitted.

The Court concludes that respondent is also not eligible to apply for cancellation of removal for certain permanent residents under Section 240A(a) of the Act. Respondent is not eligible to apply for cancellation of removal under that provision because the record demonstrates that he has been convicted of an aggravated felony within the meaning of Section 101(a) (43) of the Act. Since this case arises within the jurisdiction of the United States Court of Appeals for the 5th Circuit, the law of that circuit must be applied to determine whether respondent's conviction is an aggravated felony within the meaning of the Act. See Matter of Salazar, 23 I&N Dec. 223 (BIA 2002). Since respondent was convicted of a state jail felony when he was convicted for possession of cocaine and his offense is punishable under the Federal Controlled Substances Act, that offense of possession of cocaine for which respondent was convicted is considered a drug trafficking crime as defined in Section 924(c) of Title 18 United States Code. See United States v. Hernandez Avalos, 251 F.3d 505 (5th Cir. 2000), cert. denied, 122 Supreme Court 305 (2001). Therefore, respondent has been convicted of an aggravated felony within the meaning of Section 101(a) (43) (B) of the Act and he is ineligible to apply for cancellation of removal under Section 240A(a) of the Act. See Matter of Salazar, supra, at 235.

Respondent has also requested that in the alternative the Court administratively close this removal proceeding because there are proposed regulations relating to eligibility for Section 212(c) relief. The Court concludes that respondent has not established that there is any legal basis to

administratively close this removal proceeding simply because there are proposed regulations that have been published in the Federal Register. The Court has decided this case based upon the law at the present time.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that respondent's request for relief from removal under Section 212(c) of the Act and Section 240A(a) of the Act be pretermitted.

IT IS FURTHER ORDERED that respondent's request for administrative closure of this removal proceeding be denied.

IT IS FURTHER ORDERED that respondent be removed from the United States to Mexico pursuant to the charge of removability stated in the Notice to Appear.

Dated this 14th day of November, 2002.

_____/S/_____
HOWARD E. ACHTSAM
Immigration Judge
2/21/03

APPENDIX M

United States Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A38-095-843 -HARLINGEN Date: Jun 11, 2002

In re: JOSE JAVIER AVALOS-GUTIERREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benigno Pena, Accredited Representative.

ON BEHALF OF SERVICE: Lisa M. Putnam
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Remand

ORDER:

PER CURIAM. The Immigration and Naturalization Service timely appeals the Immigration Judge's September 3, 1997, decision terminating removal proceedings shall be sustained.

The respondent pled guilty to the charge of possession of controlled substance (cocaine) and the criminal court deferred adjudication of guilt pursuant to article 42.12, section 5 of the Texas Code of Criminal Procedure, placing the respondent on probation (Exh. 2). Contrary to the Immigration Judge's conclusion, we find that the respondent has a conviction for immigration purposes and is deportable as charged pursuant to section 237(a)(2)(B)(i) of the

Immigration and Nationally Act, 8 U.S.C. § 1227 (a)(2)(B)(i). *See Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002).

Accordingly, the Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings and the entry of a new decision.

/S/
[Illegible signature]
FOR THE BOARD

APPENDIX N

United States Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A38-095-843

In the Matter of:

Respondent: AVALOS-Gutierrez, Jose Javier currently residing at 414 Olmito Street, Brownsville, Texas 78520 (210) 544-7194

- ☐ 1. You are an arriving alien.
- ☐ 2. You are an alien present in the United States who has not been admitted or paroled.
- ■ 3. You have been admitted to the United States, but are deported for the reasons stated below.

The Service alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You were admitted to the United States at Brownsville, Texas on or about December 17, 1982, as an immigrant;
4. You were, on June 25, 1996, convicted in the 107th Judicial District Court, Cameron County, Texas for the offense of Possession of a Controlled Substance (Cocaine, less than 1 gram) in violation of s/s 481.115 of the Texas Penal Code.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act (Act), as amended, in that, at any

time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substance Act [21 U.S.C. 802]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.
- ☐ Section 235(b)(1) order was vacated pursuant to:
  - ☐ 8 CFR 208.30(f)(2)
  - ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

210 E. Jackson Street, Harlingen, Texas 78520

on To Be Set at _____ to show why you should not be
(Date) (Time)
removed from the United States based on the charge(s) set forth above.

/S/[Illegible]
Assist. Dis. Dir. for Invest.

Date: 04/30/97 Harlington, Texas
City and State

Stamped: 7/23/97

FILED
JUL 30 2007
THE CLERK
COURT, U.S.

No. 06-1312

In the Supreme Court of the United States

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys
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Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether the court of appeals abused its discretion in declining to recall its mandate so that petitioner could rely on a change in the law that occurred after the court of appeals' judgment became final and after this Court declined to docket an untimely petition for a writ of certiorari.

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In the Supreme Court of the United States

No. 06-1312

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals denying the motion to recall the mandate (Pet. App. 5a) is unreported.

JURISDICTION

The order of the court of appeals was entered on December 28, 2006. A motion for reconsideration was denied on February 13, 2007 (Pet. App. 4a). The petition for a writ of certiorari was filed on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Mexico who immigrated to the United States in 1982. Pet. App. 45a. In June 1996, he pleaded guilty to possessing less than a gram of cocaine, in violation of Texas law. *Id.* at 46a. The Immi-

gration and Naturalization Service commenced a removal proceeding against petitioner based on that conviction, *id.* at 44a-45a, and the Board of Immigration Appeals (BIA) ordered his removal, *id.* at 49a-50a.

2. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas alleging, among other things, that he was eligible for cancellation of removal because his conviction was not for an aggravated felony. Pet. App. 31a-42a. Pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(c), 119 Stat. 311, the district court transferred that action to the Fifth Circuit. Pet. App. 17a. Petitioner also filed in the Fifth Circuit a separate petition for review of the BIA's decision. *Id.* at 16a.

In January 2006, the court of appeals dismissed both petitions, but its order listed only the docket number of the direct appeal from the BIA's decision, and not the docket number assigned to the separate habeas petition. See Pet. App. 30a. Concerned that the court of appeals' dismissal of the habeas petition may have been a clerical error, petitioner filed a motion to reopen. In denying that motion in April 2006, the court specifically referred to the "second petition for review which was transferred to this Court pursuant to the REAL ID Act." *Id.* at 29a.

In April 2006, petitioner filed an unopposed motion to reconsider in light of this Court's grant of a writ of certiorari in *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). The court of appeals advised petitioner that "[t]his case is closed" and no further action would be taken. Pet. App. 28a.

Petitioner did not file a timely petition for a writ of certiorari from the court of appeals' January 2006 dismissal. Instead, in July 2006, he attempted to file an un-

timely petition, which this Court declined to docket. Pet. 6 n.2; Pet. App. 7a.

3. In December 2006, petitioner asked the court of appeals to recall its mandate in light of this Court's then-recent decision in *Lopez*. Pet. App. 14a-26a. Petitioner's motion disclosed that after the court of appeals dismissed his challenges, and after he was deported, he illegally re-entered the United States, was apprehended, and pleaded guilty to unlawful re-entry. *Id.* at 19a n.3. The court of appeals denied petitioner's motion, *id.* at 5a, as well as a subsequent motion for reconsideration, *id.* at 4a. Following his conviction, petitioner was again removed from the United States to Mexico. See Pet. 6.

ARGUMENT

Petitioner argues (Pet. 7-8) that this Court should order the court of appeals to recall its mandate in order to reconsider this case in light of *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). The court of appeals' judgment became final before this Court decided *Lopez*, and petitioner failed to file a timely petition for a writ of certiorari from that judgment. Moreover, petitioner subsequently pleaded guilty to illegal re-entry. For both of those reasons, petitioner is not entitled to the extraordinary relief he seeks.

1. Petitioner's position (Pet. 8-11) that he should be able to rely on this Court's decision in *Lopez* runs contrary to basic principles of finality. Changes in the law, such as this Court's decision in *Lopez*, generally apply retroactively to *pending* cases. But once a case reaches final judgment, that decision is final, and litigants are not generally entitled to reopen a case to rely on a change in the law. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995); *United States* v. *Schooner Peg-*

gy, 5 U.S. (1 Cranch) 103, 110 (1801) (explaining that if "*before* the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed") (emphasis added). Otherwise, final judgments would not be final.

Thus, while petitioner argues (Pet. 7-8) that he is similarly situated with other petitioners who had their cases remanded for reconsideration in light of *Lopez*, there is an obvious difference—the judgment in this case, unlike those cases, is final. The court of appeals' judgment became final when the time in which to file a petition for a writ of certiorari expired. See Pet. 12 n.4 (conceding that "the original 90 days for seeking certiorari expired"). And when petitioner later attempted to revive his case by filing an untimely petition for a writ of certiorari, this Court correctly declined to docket that petition. Pet. 6 n.2.

Petitioner is not entitled to circumvent normal rules of finality, including the time limit for filing a petition for a writ of certiorari, by demanding that the court of appeals reopen its mandate. "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, the power [to recall a mandate] can be exercised only in extraordinary circumstances." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998) (quoting 16 Charles Wright et al., *Federal Practice & Procedure* § 3998, at 712 (2d ed. 1996)). Moreover, a court of appeals' exercise of that power is reviewed "for abuse of discretion." *Id.* at 549. And this Court would grant review on that question only if the court of appeals had "far departed from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). A court of appeals' decision to uphold normal finality rules—and to respect this Court's decision to enforce the time limits

for filing a petition in this Court from the court of appeals' final judgment—hardly amounts to an abuse of discretion, much less the type of departure from the ordinary course of proceedings that would warrant this Court's review.

2. Petitioner's reliance (Pet. 8 n.3, 10) on *Lords Landing Village Condominium Council of Unit Owners* v. *Continental Insurance Co.*, 520 U.S. 893 (1997) (per curiam), is misplaced. In declining to recall the mandate in that case, the court of appeals failed to discuss a contrary decision the Maryland Supreme Court had handed down 11 days before the court of appeals' initial decision, and it appeared that the parties had been unaware of the state court's decision until after the mandate issued. *Id.* at 895. This Court concluded that, in refusing to recall its mandate, the court of appeals should have explicitly discussed the relevance of the state supreme court case. *Id.* at 897. *Lords Landing* is inapposite because this Court decided *Lopez* after this case went to final judgment, not shortly before the initial court of appeals' decision, and normal finality rules therefore apply.*

3. Moreover, petitioner illegally re-entered this country after his removal, pleaded guilty to illegal reentry, and was removed once again. Pet. 6. Such unclean hands weigh heavily against a grant of discre-

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* Petitioner cites (Pet. 12 n.4) two cases in which the Fifth Circuit recalled its mandates. This Court does not sit to review asserted intracircuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam). Moreover, the decision to recall a mandate in a particular case is discretionary. See *Calderon*, 523 U.S. at 549. As discussed in the text, denial of such discretionary relief was warranted here not only in light of ordinary principles of finality, but also because of petitioner's illegal re-entry.

tionary relief, whether in the form of a recall of the mandate in these judicial proceedings or cancellation of removal in administrative proceedings.

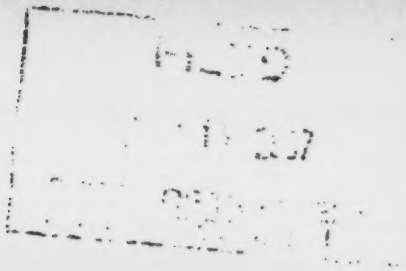
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

JULY 2007



No. 06-1312

In the Supreme Court of the United States

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government does not dispute that under *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006), Petitioner Jose Javier Avalos-Gutierrez would be entitled to pursue cancellation of removal—a right he was denied by the Board of Immigration Appeals. It also does not dispute that his appeal was dismissed through a clerical error, or that the Fifth Circuit has repeatedly refused to correct that error without explanation. And the Government no longer defends the reasons it gave the Fifth Circuit in support of rejecting Mr. Avalos-Gutierrez's motion to reopen this case more than a year ago.

Under the circumstances, none of the Government's current arguments can justify the Fifth Circuit's refusal to recall the mandate in this case. In light of *Lopez*, this Court has already granted, vacated, and remanded dozens of cases that were pending in the Fifth Circuit concurrently with this one—including one of the very cases on which the Government's Fifth Circuit arguments relied. See Pet. 11 & App. A. This case should be treated no differently.

1. A grant of relief in this case would not "circumvent normal rules of finality," as the Government contends. Opp. 4. Far from it. The Fifth Circuit's own cases provide that a recall of the mandate is necessary to avoid injustice where a subsequent Supreme Court decision renders a Fifth Circuit decision "demonstrably wrong" or creates a "danger of incongruent results in cases pending at the same time." *United States* v. *Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) (quoting *American Iron & Steel Inst.* v. *E.P.A.*, 560 F.2d 589, 594 (3d Cir. 1977)). This proposition holds even when the litigant seeking recall of the mandate did not make *any* effort to seek certiorari or otherwise keep his case open pending the Supreme Court's decision.

See *ibid.*; Pet. 12 n.4. Here, it is undisputed that the Fifth Circuit's refusal to hear and grant relief in the appeal was "demonstrably wrong" in light of *Lopez* and that its refusal to recall the mandate leaves "incongruent results in cases pending at the same time." 116 F.3d at 120.

This injustice is amplified by the extraordinary errors that infected the Fifth Circuit's consideration of this case from the beginning—errors that represent a dramatic departure from the usual and accepted course of judicial proceedings. Sup. Ct. R. 10(a). As the Petition explains, this appeal was dismissed through an apparent clerical error. Pet. 4-5. Then, following the initial dismissal, the Fifth Circuit apparently accepted the Government's argument that it could simply decline jurisdiction (and thus keep the appeal dismissed) on the ground that the petitioner's position on the central issue—whether a state-court conviction for simple possession was an aggravated felony for purposes of the immigration laws—was not "colorable" in the Fifth Circuit. Pet. 5. Since then, the Government has conceded (as it must) that the REAL ID Act "definitively resolved" the question of the courts of appeals' jurisdiction over cases like this one. Pet. 6-7. Thus the Government has now abandoned the very argument offered to (and apparently accepted by) the Fifth Circuit. It is now undisputed that a court of appeals cannot simply decline jurisdiction over an immigration case based on its doubt about whether the appeal will succeed on its merits.

Moreover, even if it had been appropriate for the Fifth Circuit to decline jurisdiction on that basis, the court's apparent conclusion that the appeal was not "colorable" was flatly wrong then and remains wrong now. Even at that time, other circuits had resolved the "aggravated felony" question differently from the Fifth Circuit, and several petitions for certiorari were pending in this Court to resolve the conflict among the circuits—*with* the Solicitor General's acquiescence. Pet. 5. Despite these facts—fully

briefed in connection with the motion to reopen the case—the Fifth Circuit still refused to allow the appeal to proceed. *Ibid.* Then, on the very same day as the Fifth Circuit's order refusing to reopen the instant case, this Court granted certiorari in *Lopez*—thus casting the Fifth Circuit's precedents further in doubt. *Ibid.* But when Mr. Avalos-Gutierrez promptly brought the grant of certiorari to the Fifth Circuit's attention in an unopposed motion, the Fifth Circuit inexplicably refused to docket it. Pet. 6. Later efforts to reopen the case in light of the Government's changed position on the jurisdictional issue were also unsuccessful. Pet. 6-7.

The fact that the time to seek certiorari in this case passed before the decision in *Lopez* was rendered should not have barred relief in the Fifth Circuit and should not affect the disposition of this Petition. As noted above, normal rules of finality allow a court of appeals to recall its mandate to avoid injustice based on a subsequent Supreme Court decision, even if the movant made no effort at all to seek certiorari or otherwise to keep the case open. Here, Mr. Avalos-Gutierrez and his counsel have worked mightily to keep his case open. Pet. 5-7. Indeed, the Government does not dispute that when the filing deadline passed, the parties were awaiting a ruling from the Fifth Circuit on an *unopposed* motion to hold the case open pending this Court's decision in *Lopez*. The outcome in this case cannot turn on the fact that Mr. Avalos-Gutierrez—having filed a motion to hold the case open *with the Government's consent*—did not also file a "me too" petition for certiorari from the dismissal to raise an issue that this Court had already agreed to review. Nothing in the rules of finality compels such a result. See Pet. 12 n.4 (discussing Fifth Circuit cases providing that a recall of the mandate is necessary to remedy the incongruity that results when, as here, a timely petition for certiorari is filed in one case but not in another, concurrent case).

The Government's reliance on *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (Opp. 3), is misplaced. In that case, Congress attempted to reopen cases that had been finally dismissed with prejudice so that litigants could take advantage of new legislation. This Court properly rejected that effort as a violation of separation of powers. That case did not speak to whether a mandate should be recalled when the Supreme Court vacates and remands the very precedent on which the lower court apparently relied in denying relief. And in any event, the law applicable to this case has not changed. The only change is in the Fifth Circuit's faulty interpretation of that law—a change that would unquestionably apply here if the Fifth Circuit had followed the ordinary course of judicial proceedings. See *Gonzalez-Gonzalez* v. *Weber*, 472 F.3d 1198 (10th Cir. 2006) (*Lopez* applies retroactively; "[C]ases interpreting statutes are 'fully retroactive because they do not change the law, but rather explain what the law has always meant.'") (citations omitted).*

For all these reasons, even setting aside the tension between the result in this case and *Lopez*, the Fifth Circuit's handling of this case from the beginning has indeed "far departed from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). See Opp. 4-5. Under the extraordinary circumstances in this case, the Fifth Circuit's refusal to recall the mandate and apply this Court's decision in *Lopez* cannot be allowed to stand.

2. The Government's argument about Mr. Avalos-Gutierrez's reentry has no place in these certiorari pro-

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* The interest in finality is not as irrefutable as the Government suggests. This court has long recognized that judgments can and sometimes must be disturbed even years after they become final. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (reversing the Third Circuit's refusal to recall its mandate twelve years after a decision had been rendered final, based on a showing of injustice resulting from a later-revealed fraud on the court).

ceedings. The issue before the Fifth Circuit (and this Court) is whether, under the statute, Mr. Avalos-Gutierrez is entitled to *pursue* cancellation of removal. Under *Lopez*, the answer is yes. Indeed, the Government does not contend (nor could it) that Mr. Avalos-Gutierrez's misdemeanor conviction for illegal reentry is a barrier to his application for cancellation. Pet. 13.

Whether Mr. Avalos-Gutierrez ultimately *receives* cancellation of removal is a question to be decided in the first instance by an Immigration Judge, in light of all the evidence presented by the parties. Pet. 13-14. As the Petition explains, that evidence would reveal Mr. Avalos-Gutierrez's more than 20 years of productive life and work as a legal permanent resident in Texas, his extended family in the area, and his U.S. citizen children. It would also show his successful completion of probation and a drug education program following his state deferred-adjudication conviction for possessing less than one gram of cocaine—a conviction for which he served no time and which he is now entitled under state law to have expunged from his record. *Ibid.*

The injustice here derives from the fact that Mr. Avalos-Gutierrez was denied the right to present his case for cancellation—a right that he was undeniably granted by Congress under the Immigration and Nationality Act, as interpreted by *Lopez*. See 8 U.S.C. § 1229b(a)(3). This Court's intervention is required to ensure the Fifth Circuit's fidelity to *Lopez* and to correct the extraordinary series of errors in this case that took the Fifth Circuit far from the accepted and usual course of judicial proceedings.

* * *

Petitioner respectfully asks that the petition for a writ of certiorari be granted, the Fifth Circuit's order vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *Lopez*. Alter-

natively, Petitioner asks that the Court grant the petitior and set the case for plenary review.

Respectfully submitted.

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